Alaska Workers' Compensation Appeals Commission

ENCO Heating and Alaska National Insurance Co.,
Movants,

vs.

Mariska Borgens, beneficiary of Kevin K. Borgens,
Respondent.

Memorandum Decision
Decision No. 034 February 26, 2007

AWCAC Appeal No. 06-042
AWCB Decision No. 06-0334
AWCB Case Nos. 199425123,
200028055

Motion for Extraordinary Review from Alaska Workers' Compensation Board Interlocutory Decision No. 06-0334, issued December 22, 2006 by the northern panel at Fairbanks, William Walters, Chairman, Damien J. Thomas, Member for Labor, Debra G. Norum, Member for Industry.

Appearances: Robert J. McLaughlin, Mann, Johnson, Wooster & McLaughlin, attorney for movants ENCO Heating and Alaska National Insurance Co.; Mariska Borgens, pro se, respondent.

Commissioners: Chris Johansen, Jim Robison, and Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Chris Johansen, Appeals Commissioner.

ENCO Heating asks the commission to review an interlocutory decision and order by the board finding that ENCO waived the right in a settlement agreement to reduce death benefits based on a cost of living adjustment for beneficiaries living out of state. The board held that the word "rate" is a term of art under the Workers' Compensation Statute and, based on its use in the settlement document, implied a waiver on the part of the employer of the right to reduce benefits under AS 23.30.175(b). Although the commission agrees that this is a novel question of law, because immediate review will not materially advance the termination of the litigation, we deny the motion for extraordinary review.

Facts and board proceedings.[1]

Kevin K. Borgens, the employee, injured his back at work on November 10, 1994, triggering an extended period of back pain and treatment, including surgery, that ended only with his death from an adverse reaction to his prescription drugs on June 9, 2003. Over this time, three different insurers provided workers' compensation coverage to the employer. After Mr. Borgens's death, the insurers and the Second Injury Fund (SIF) contested their liability for death benefits to his beneficiaries[2] under AS 23.30.215.

A settlement conference held on October 30, 2003, resulted in a Compromise and Release (C&R) agreement, drafted by the employer's attorney and approved by the board on November 26, 2003. Under that agreement, the insurers and the SIF agreed to contribute various lump sum amounts and the SIF also agreed to reimburse the insurer paying the beneficiaries death benefits under AS 23.30.215, starting on November 9, 2003.

The C&R agreement provided that the Alaska National Insurance Company would administer the death benefits on behalf of the SIF. Specifically, the agreement stated on page 5: "Under the terms of this agreement, death benefits are to be paid to the beneficiaries of Mr. Borgens. The rate for death benefits will be $353.29 per week." Page 11 of the agreement provided further that the "Second Injury Fund will pay reimbursement for death benefits to Mrs. Borgens and her minor children beginning from November 9, 2003 after approval of the C&R. The payments will be administered by ANIC according to the terms of the Workers' Compensation Act."

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[1] We decide this motion for extraordinary review based on the pleadings submitted; we have no access to the board's record. We make no findings of fact; our brief review of the facts presented to us is provided to place the issue raised in the motion in context.

[2] Mariska Borgens, the widow of Kevin Borgens, is currently the only beneficiary receiving benefits under AS 23.30.215. The two children of Kevin Borgens have attained their majority since his death and are no longer receiving benefits. If the agreement incorporates the provisions of the Act, the children would resume receipt of benefits and Mrs. Borgens's benefits would be reduced if the children enroll in college, trade school, or vocational school. AS 23.30.395(8).

On November 2, 2004, the employer sent Mrs. Borgens and her children Records Release forms for the social security records. They objected to these releases and on August 28, 2006, the employer filed a Petition to Compel asking the board to order them to sign.

On April 24, 2006, Mrs. Borgens moved to Donnelly, Idaho, for work reasons. The employer responded by reducing the death benefits to $282.63 per week based on a COLA of 80 percent under AS 23.30.175(b). Mrs. Borgens strongly objected to this adjustment. At a November 2, 2006, pre-hearing conference, both the employer's motion to compel the release of social security information and Mrs. Borgens's opposition to the reduction of death benefits were set for hearing on November 30, 2006.

At the hearing, Mrs. Borgens testified that, based on the settlement negotiations and the language of the C&R agreement, she believed that she had agreed to a fixed rate of $353.29 per week in death benefits. She argued that the employer should not be able to adjust that rate after the fact. She also objected to giving the employer her family's social security numbers, noting that they had received survivor's benefits for only a very short period of time. She asked that if their social security records had to be released, that they be given to Workers' Compensation Division staff for review.

The employer argued that the C&R agreement explicitly stated that death benefits would be administered "according to the terms of the Workers' Compensation Act," which provides, in AS 23.30.175(b), for a cost of living adjustment of benefits paid to beneficiaries living outside of Alaska. Similarly, AS 23.30.225(a) provides for a reduction in compensation based on receipt of survivors' benefits. Mrs. Borgens's understanding of the C&R agreement was simply mistaken, according to the employer, and the board should order an adjustment in the death benefit rate based on the COLA and the release of the family's social security records.

The board's decision

Citing *Clark v. Municipality of Anchorage*,[3] the board determined that it should interpret the terms of the C&R agreement in light of the intent of the parties at the time the agreement was signed.[4] Although the board noted that the C&R agreement stated that the death benefits would be administered under the terms of the Workers' Compensation Act, it found that "the terms of the C&R are specific and unambiguous that the beneficiaries' compensation rate is $353.29 per week."[5] Arguing that the term "rate" is a term of art in the Alaska Workers' Compensation Act, the board decided that "the employer waived any right to adjust the beneficiaries' compensation to a different rate under AS 23.30.175."[6]

However, the board also ruled that since the C&R agreement provided that the death benefits would be administered under the terms of the Act and the Act provides for the offsetting of social security survivors' benefits,[7] Mrs. Borgens and her children were obligated to release their social security records.[8] But because the board also believed that the beneficiaries might have an equitable estoppel argument against the offsetting of social security benefits, it retained jurisdiction over that issue and instructed the parties to arrange a hearing on the question if the employer wished to pursue it.[9]

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[3] 777 P.2d 1159 (Alaska 1989).

[4] *Estate of Kevin K. Borgens v. ENCO Heating*, AWCB Dec. No. 06-0334 (December 22, 2006) at 6.

[5] *Id*. at 7.

[6] *Id*.

[7] *See* AS 23.30.225(a).

[8] *Borgens v. ENCO*, at 8-9.

[9] *Id*. at 10.

Following the board's order, the employer asked the commission for extraordinary review of the decision that it had waived the right to adjust the death benefits when the beneficiaries moved to Idaho.

Discussion

We consider, in a motion for extraordinary review, whether we find compelling circumstances that match our criteria in 8 AAC 57.076. This provides that the commission will grant such review only when it finds the strong policy favoring appeals from final orders or decisions is outweighed by one of the following factors: (1) that delaying review will work an injustice, cause significant expense or undue hardship; (2) that immediate review may materially advance the termination of the litigation and the Board's decision involves an important question of law on which there is substantial grounds for difference of opinion, or on which board panels have issued differing opinions; (3) that the board has so far departed from the usual course of proceedings and regulations as to call for the commission's intervention; or (4) the issue is one likely to evade review and an immediate decision from the commission can provide guidance to the board. A refusal of a motion for extraordinary review should not be read as approval or disapproval of the board's decision.

ENCO argues that extraordinary review is appropriate because the board's decision involves a "novel question of law" – what constitutes a "term of art"? ENCO further claims that we should grant extraordinary review because the review involves a single issue, resolution of which "will immediately resolve the extant dispute." Mrs. Borgens, representing herself and the other beneficiaries, argues that the contract terms should not be adjustable because she (for herself and her minor children) settled for a certain weekly rate in lieu of a lump sum payment and any adjustment downward gives her less than she bargained for. We note, however, that Mrs. Borgens also stated that she was informed that future remarriage would affect her benefits, so that she understood that the rate was, in fact, subject to modification in the future and not a fixed amount.

We find that the employer presents important and novel questions of law on which there may be substantial ground for difference of opinion. The board was not

asked to set aside a C&R agreement, but really to interpret how the agreement should be implemented in light of changed circumstances. There appears to be internal inconsistency in the board's decision handling of the two contested issues. We also note that the board apparently did not use the *Milne v. Anderson* test for determining whether a party impliedly waived a known right;[10] but chose instead to interpret the language of the C&R agreement as reflecting an intent to waive a known right—that is, to a COLA adjustment if the employee moves—without using that test.[11]

We find, however, that the resolution of this question will not materially advance the ultimate termination of the litigation, as the question over which the board retained jurisdiction (the Social Security offset) will require decision in any event. We are also troubled by the absence of the Second Injury Fund, whose counsel may be of assistance in resolving this matter, and, while we were verbally assured that the SIF was informed, we find no service of the motion for extraordinary review on the SIF or its attorney. The SIF was a party to the C&R agreement, and, while the agreement provides for the *administration* of the payments by the movant, the source of payment ultimately is the SIF. The board did not address in its decision whether the state, through the SIF, waived enforcement of a state statute in the agreement.

The commission's ability to decide the issue on appeal will be improved by (a) the opportunity of the board to explain its thinking further as it considers the social security offset; (b) the opportunity to build a more complete record, including a copy of the recording described by the claimant, which may be the parties putting the settlement terms on the record, and the documents reflecting the parties' course of conduct regarding the social security offset.[12]

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[10] 576 P.2d 109, 112 (Alaska 1978) ("To prove an implied waiver of a legal right, there must be direct, unequivocal conduct indicating a purpose to abandon or waive the legal right, or acts amounting to an estoppel by the party whose conduct is to be construed as a waiver.")

[11] *See also*, *Schmidt v. Beeson*, 869 P.2d 1170, 1175 (Alaska 1194).

[12] *See*, *Wausau Ins. Co. v. Van Biene*, 847 P.2d 584 (Alaska 1993).

We believe denial of a motion for extraordinary review will result in speedier resolution of the case. We urge the parties to proceed quickly to a final board decision or other resolution. Also, production of a complete record and decision will permit, if either party appeals from a final board decision, a sound and thoughtful review of the board's decision without speculation regarding the board's reasons for its decision.

Conclusion

Although the employer presents a novel question of law in this case, we find that extraordinary review is not merited because it will not materially advance the ultimate termination of this litigation. We therefore deny the motion for extraordinary review.

Date: *26 February 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Chris Johansen, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final commission decision on the merits of this appeal from the board's decision and order. However, it is a final decision on whether the movant is permitted to appeal the board's interlocutory decision and order to this commission. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted. The date of filing is found in the commission clerk's Certification below.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on the merits of the claim, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. No decision has been made on the merits of this appeal, but if you believe grounds for review exist under the Appellate Rules, you should file your petition within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f). If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Memorandum Decision on Motion for Extraordinary Review, AWCAC Dec. No. 034, in the matter of *ENCO Heating and Alaska Nat'l Ins. Co. vs. Mariska Borgens, Beneficiary of Kevin Borgens*; AWCAC Appeal No. 06-042, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *26th* day of February, 2007.

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision in AWCAC Appeal No.06-042 was mailed on *2/26/07* to McLaughlin, Borgens, SIF, Office of the Attorney General, at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk,

Signed *2/26/07*
L. Beard, Deputy Clerk Date